IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HARRIET IRENE WIDDOWS, Individually, and as Personal Representative of the Estate of Thomas Francis Widdows, Deceased, Plaintiff,

Plaintiff,

v.

FRED MEYER, INC., a Delaware Corporation; THE KROGER Co., an Ohio Corporation; KROGER GROUP COOPERATIVE, INC., an Ohio Corporation; THE KROGER CO. HEALTH & WELFARE BENEFIT PLAN,

Defendants.

No. CV-07-795-HU

OPINION & ORDER

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HUBEL, Magistrate Judge:

Plaintiff Harriet Widdows, appearing individually and as personal representative of the estate of her late husband, Thomas Francis Widdows (Widdows), brings this action against Fred Meyer, the Kroger Company, the Kroger Group Cooperative, and the Kroger Company Health & Welfare Benefit Plan. Plaintiff brings two claims under the Employee Retirement Income Security Act (ERISA), and two state common law claims.

Defendants move to dismiss on the basis that plaintiff failed to exhaust the administrative claims process. Alternatively, defendants move to stay the action pending exhaustion of the administrative claims process.

All parties have consented to entry of final judgment by a Magistrate Judge in accordance with Federal Rule of Civil Procedure 73 and 28 U.S.C. § 636(c). Although I dismiss the claims, and therefore grant the motion, I do so for reasons other than those articulated by defendants.

BACKGROUND

Based on the Amended Complaint, plaintiff is the personal representative of the estate of her late husband, who died on October 12, 2006, at the age of sixty-seven. Fred Meyer is wholly owned by defendant The Kroger Company, an Ohio corporation, and/or The Kroger Group Cooperative. Fred Meyer and The Kroger Company issued various benefits to its employees through The Kroger Health & Welfare Benefit Plan. Fred Meyer and The Kroger Company were sponsors of the Plan under ERISA, and The Kroger Company was the Plan administrator. One of the plan benefits was group life insurance.

Widdows worked for over twenty years as a pharmacist for Fred Meyer. In early 2000, he was diagnosed with lymphoma. In October 2005, he went on short term disability in anticipation of a stem cell transplant, after receiving approval of his request for a non-Family Medical Leave Act leave of absence from October 16, 2005, to April 15, 2006. By April 2006, it became apparent that Widdows was not likely to recover from his illness and that he might not be able to return to work.

On March 31, 2006, Fred Meyer/The Kroger Company, issued a letter to Widdows that stated:

> This letter is to confirm the offer to rehire you to Fred Meyer pharmacy as soon as you are able to return to work after your stem cell transplant. Due to your short-term disability leave of absence being maximized in April of 2006, Fred Meyer will have to terminate your employment with our company in order for you to be eligible to obtain COBRA insurance benefits for your medical needs. Having searched all options, this is what needs to be done for your benefit. Based on your health, we would like to rehire you with the same vacation benefits that you currently have. . . . Upon your return to work, we will assess the possibility of having your original hire date of 01/17/1987 reinstated. The reinstatement will be assessed by the benefits department in conjunction with the VP of pharmacy.

Am. Compl. at ¶ 9.

Plaintiff alleges that at no time did Fred Meyer/Kroger ever consider or communicate to Widdows how the fact of being terminated and possibly later rehired, would impact his right to life insurance benefits. No defendant ever notified Widdows that Fred Meyer/Kroger's actions regarding the changes in his employment status and termination of his employment, would result in the termination of his life insurance benefits. None of the defendants notified Widdows that he had conversion rights under the applicable policy, by which he could have obtained life insurance with

benefits equal to one and one-half times his basic annual earnings. Plaintiff alleges that to the contrary, defendants told Widdows that his life insurance could not be retained.

After Widdows's death, plaintiff attempted to assert rights to the life insurance. In an April 4, 2007 letter, Chip Collier of Fred Meyer/Kroger, told Widdows's son, Thomas A. Widdows, that Widdows had not been eligible to port his benefits into a private policy because he did not have voluntary life insurance and that he was not entitled to continued benefits. In the April 4, 2007 letter, plaintiff was informed by defendants that a claim for life insurance benefits would not be honored, in that Widdows was not eligible for insurance under the plan at the time of his death.

In the Amended Complaint, plaintiff brings four claims: (1) a claim under ERISA for denial of life insurance benefits pursuant to 29 U.S.C. § 1132(a)(1)(B); (2) a claim under ERISA for equitable estoppel; (3) negligence; and (4) wrongful discharge.

STANDARDS

A motion to dismiss for failure to exhaust nonjudicial remedies "is a matter in abatement, not going to the merits of the claim," and is properly brought as a nonenumerated Rule 12(b) motion. Ritza v. International Longshoremen's & Warehousemen's Un., 837 F.2d 365, 368-69 (9th Cir. 1988). Failure to exhaust nonjudicial remedies "is not properly raised in a motion for summary judgment." Id. at 368.

This "distinction between summary judgment and dismissal for matters in abatement bears on the district court's authority to resolve factual disputes[.]" Id. at 369. In a summary judgment proceeding, the court may not resolve material factual issues as

those are left for the jury's consideration. Id. However, "where a factual issue arises in connection with a jurisdictional or related type of motion, the general view is that there is no right of jury trial as to that issue and that the court has a broad discretion as to the method to be used in resolving the factual dispute." Id. (internal quotation and ellipsis omitted).

DISCUSSION

In this case, it is relevant to note at the outset that plaintiff raises her common law negligence and wrongful discharge claims as alternative claims. She states, in support of the negligence claim, that the claim is brought "only in the event that the Court finds that Widdows was neither enrolled in nor eligible in a life insurance plan governed by ERISA[.]" Am. Compl. at ¶ 25. This allegation is incorporated by reference into the wrongful discharge claim. Id. at ¶ 28.

Additionally, plaintiff's jurisdictional allegations are conditional. She asserts that "[t]o the extent Widdows was eligible for benefits under the Plan, jurisdiction is conferred" on the court by ERISA. Id. at ¶ 4. In their Answer to the Amended Complaint, defendants admit that the court has jurisdiction under 29 U.S.C. § 1132(e)(1) and (f). Answer at ¶ 4.

Continuing with her jurisdiction allegations, plaintiff then asserts that "[t]o the extent that Widdows is not eligible for benefits under the Plan, plaintiff's state law claims (her third and fourth claims for relief) are not subject to preemption by ERISA and supplemental jurisdiction is conferred on the court." Am. Compl. at ¶ 5. Defendants deny those allegations. Answer at ¶ 5.

Plaintiff explains that this case was originally filed in state court and asserted claims of negligence, wrongful discharge, and breach of contract. On May 29, 2007, defendants removed the case to federal court, based on ERISA preemption. Plaintiff did not move to remand the case back to state court because the original complaint did allege an "action on a life insurance policy," which plaintiff concedes was governed by ERISA.

However, on October 17, 2007, the Ninth Circuit decided Miller v. Rite Aid Corp., 504 F.3d 1102 (9th Cir. 2007), which, according to plaintiff, changed the legal landscape. In response to Miller, plaintiff filed the operative Amended Complaint with its alternative claims and conditional jurisdictional allegations. The resolution of the instant motion requires me to interpret Miller and apply it to the allegations in this case.

Generally, under Ninth Circuit precedent, a claimant must exhaust administrative remedies before the claimant can bring an ERISA action in court. Abatie v. Alta Health & Life Ins. Co., 458 F.3d 955, 961 n.2 (9th Cir. 2006) ("The ERISA statutes do not require exhaustion of administrative remedies before a claimant can bring an action in court, but our cases suggest that a claimant must exhaust administrative remedies first."). Defendants rely on this governing principle to support their motion to dismiss for plaintiff's failure to exhaust the available administrative remedies.

The problem, however, is that under Miller, Widdows is no longer considered a claim participant or beneficiary and thus, he has no ERISA claims for which exhaustion is required. Rather, because his status as a participant or beneficiary is fundamental

to the right to bring an ERISA claim, his status, assessed under Miller as a non-participant or beneficiary at the time of his death, requires the dismissal of the ERISA claims. Additionally, while defendants argue that this Court nonetheless retains jurisdiction over the state common law claims by virtue of their being preempted by ERISA, Widdows's non-participant status under Miller similarly precludes ERISA preemption. Accordingly, I remand the state claims back to state court.

Miller was an ERISA preemption case, not an exhaustion case, but it nonetheless controls. "A civil action under ERISA may be brought by a 'participant' in or 'beneficiary' of an ERISA plan." Miller, 504 F.3d at 1105-06 (citing 29 U.S.C. § 1132(a)(1)). Miller explained that

> Miller's estate and her beneficiaries[] may bring a civil suit under ERISA only if Miller was a "participant" in an ERISA plan at the relevant time. ERISA defines a "participant" as "any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan . . . or whose beneficiaries may be eligible to receive any such benefit." 29 U.S.C. § 1002(7). The Supreme Court has interpreted this provision to mean that a party is a "participant" if he is an employee in, or reasonably expected to be in, currently covered employment, or if he is a former employee who has a reasonable expectation of returning to covered employment or a "colorable claim" to vested benefits. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 117 (1989).

Miller, 504 F.3d at 1106.

In Miller, the decedent had been employed by Rite Aid until the time of her death. In February 2001, she was diagnosed with terminal cancer and went on disability until her death one year later, in February 2002. While she was on disability, her employer terminated its group life insurance plan provided by ReliaStar and replaced it with a group plan provided by Standard Insurance. The

decedent was not enrolled in the Standard plan because she was not included in the list of employees exempt from the plan's "active at work" requirement. Thus, the decedent was not enrolled in a group life insurance plan after Rite Aid terminated the prior plan. The decedent also did not convert the prior group plan into an individual plan.

Given that the decedent was actually still employed by Rite Aid when she died, the question asked by the Ninth Circuit to determine if she was a "participant," was whether she was either (1) covered by an ERISA life insurance plan at the relevant time, or (2) whether she may have become eligible for benefits from such a plan at such time. Id. at 1106. To establish that she "may become eligible," she had to "have a colorable claim that (1) she will prevail in a suit for benefits, or that (2) eligibility requirements will be fulfilled in the future." Id. (internal quotation and brackets omitted).

To answer these questions, the court had to first identify the relevant time for determining whether the decedent was a participant. Id. The court had previously held that whether a living party is a participant or beneficiary is determined as of the time the lawsuit is filed. Id. However, the court had never identified the applicable time for evaluating the claims of a decedent's estate and beneficiaries. Id.

The court held that in the case of a deceased employee, the court looks to the time of the employee's death to determine whether he or she is covered by an insurance plan. Id. at 1107. This is also the applicable time for determining whether the decedent had a colorable claim to benefits. Id.

In analyzing the facts under this standard, the Miller court stated that at the time the decedent died, she did not qualify as a "participant" in any ERISA life insurance plan because at that time, she was not covered by any life insurance policy and she had no colorable claim to benefits under any plan. Id. The decedent was not covered by the prior plan because Rite Aid terminated the plan before she died. Id. She did not have a colorable claim to benefits under the prior plan because life insurance plans have no obligation to pay benefits to any person who is still alive at the time of termination. Id. The court noted that none of the former members of the prior plan had any colorable claim to benefits after the plan was terminated. Id.

The decedent was also not covered by the Standard plan that replaced the prior plan because the Standard plan's "active-at-work" requirement made her ineligible for enrollment. Id. at 1108. If she was never eligible for coverage under the Standard plan, she could not have a colorable claim to benefits under that plan. Id. The court also explained that because the decedent herself was not a participant in any ERISA plan, her estate could bring a suit under ERISA. Id.

The decedent's children could also not bring a suit as "beneficiaries" of an ERISA plan because the decedent was not a participant in any plan. Id. ERISA defines a beneficiary as someone designated by a participant, or "by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(8). The court explained that just as it looked to the time of the employee's death to determine whether he is a "participant," it looked to the time of death to

determine whether the employee's children were beneficiaries. Id. The court stated that the claim of the decedent's children to benefits under ERISA can be no greater than the decedent's claim. Id.

In the briefing on the instant motion, plaintiff states that defendants have not provided a definitive statement as to whether Widdows was a participant in the plan who was eligible for life insurance benefits at the date of his death. Plaintiff notes that the record suggests that that is defendants' position, but there is no affirmative, unequivocal statement to that effect. See Exh. A to Thomas A. Widdows's Declr. (Apr. 4, 2007 letter from Collier stating, in part, that "the only life insurance that can be ported into a private policy is voluntary life insurance, not basic life insurance. Unfortunately, your father was not enrolled in voluntary life insurance."); see also Answer at ¶ 11 (admitting that Chip Collier of Kroger sent an email to Widdows's son on April 4, 2007, and further admitting that the April 4, 2007 email stated that Widdows did not have life insurance coverage under the plan at the time of his death); Id. at ¶ 13 (denying the allegations in paragraph 13 of the Amended Complaint in which plaintiff alleges that "Widdows was entitled to continue basic life insurance benefits" under the Plan's provisions).

Plaintiff notes that in support of the motion to dismiss, defendants submit the declaration of Kathleen Lengle, Manager of Kroger Benefits Systems & Services, who states that Widdows's employment with Fred Meyer terminated on April 16, 2006, and that neither he, nor plaintiff converted his group life insurance policy to an individual plan within the time allowed by the plan. Lengle

Declr. at ¶ 8.

Plaintiff contends that Lengle's statement, combined with Collier's April 4, 2007 email, noted above, suggests that defendants do not believe that Widdows was a participant in the group life insurance plan at the time of his death and thus, there is no ERISA cause of action under Miller and thus, any requirement of exhaustion would be futile. At the May 20, 2008 oral argument on the motion, defendants' counsel confirmed on the record that defendants do in fact believe, and would assert in any administrative proceeding, that Widdows was not a participant or beneficiary of the life insurance plan.

Based on the record, both written and defendants' counsel's statements at oral argument, it is clear that Widdows was not a participant or beneficiary in the life insurance plan at the time of his death and thus, under Miller, he does not have an ERISA claim. Although defendants suggest that the issue of whether Widdows was or was not a plan participant or beneficiary should be adjudicated in the administrative appeal process, I disagree.

First, Miller rejected a similar argument. There, defendant Rite Aid argued that the extent to which it failed to provide life insurance depended on the terms of the policy in which the decedent was once enrolled. The court stated that "a party does not become a 'participant' in a plan merely because the court will have to look to the terms of a terminated plan to determine the employer's liability for failure to create a new plan." Miller, 504 F.3d at 1108. Thus, the court expressed its position that interpretation of plan language is not a prerequisite to determining whether the plaintiff or the decedent was a participant or a beneficiary.

Second, Miller and other cases indicate that the question of whether the plaintiff, or the decedent in the instant case, is a participant or beneficiary, is a question of law for the court because it is determinative of the court's jurisdiction and the plaintiff's standing. Notably, the Miller decision itself, after concluding that the appropriate time for the determination is the date of death, then went on to analyze whether the decedent or her beneficiaries were participants or beneficiaries under the ERISA statute as of the date of death.

In Harris v. Provident Life & Accident Ins. Co., 26 F.3d 930 (9th Cir. 1994), a former employee brought an action alleging state law causes of action for misrepresentation and breach of contract with respect to coverage under the employer's health care plan. The former employee also brought an ERISA claim for breach of fiduciary duty. In the context of discussing federal jurisdiction, the court noted that a federal court does not have jurisdiction to hear a civil action under ERISA brought by a person who is not a participant, beneficiary, or fiduciary. Id. at 933. The court noted that it had previously held that ERISA jurisdiction did not extend to the claim of a former employee who was not a plan participant in an employee benefit plan. Id.

The court stated that whether a living person is a plan participant is decided as of the time of the filing of the lawsuit. Id. The court, as in Miller, quoted the relevant Supreme Court case regarding the interpretation of the relevant statutory language. Id. The court then itself determined whether the plaintiff fit the definition and held that he was not a plan participant and thus, it had no jurisdiction to hear the ERISA

claim for breach of fiduciary duty. Id.

In a case originally before Judge Marsh, the plaintiff brought an ERISA breach of fiduciary duty claim. McLeod v. Oregon Lithoprint, Inc., 46 F.3d 956 (9th Cir. 1995), vacated on other grounds, 517 U.S. 1116 (1996). The defendant argued that she could not recover under ERISA because she was not a plan participant. Both parties agreed that the issue of whether she was a plan participant as defined by ERISA was a legal question for the district court to resolve. Id. at 957-58. The court went on to discuss the issue, noting initially that whether an employee is a participant in an ERISA plan is critical because it involved both standing and subject matter jurisdiction.

Based on these cases, the determination of whether plaintiff or the decedent was a participant or beneficiary as defined in the ERISA statute, is a threshold question of law for the court because it implicates the court's jurisdiction. It is immaterial that the cited cases addressed the possible preemption of ERISA claims rather than exhaustion because the legal issue is the same in either context.

As of the time of his death, Widdows was not a group life insurance plan participant. He was not an employee in currently covered employment. He was not a former employee with a reasonable expectation of returning to covered employment or who had a colorable claim to benefits. See Miller, 504 F.3d at 1107 n. 6 (noting that "determining what constitutes a colorable claim to benefits is not the same as determining whether a plaintiff might recover under any cause of action. The relevant issue is whether a plaintiff might recover under an ERISA claim."). As in Miller,

because Widdows was not a participant in any ERISA plan, his estate cannot bring a suit under ERISA. Id. at 1108. And, as in Miller, plaintiff is not a "beneficiary" because the claim of Widdows's wife, or children, "to benefits under ERISA can be no greater than [Widdows's] claim." Id.

Because neither Widdows, his estate, nor plaintiff are participants or beneficiaries, there is no viable ERISA claim. Subjecting the two ERISA claims pleaded in this case to the administrative process would be futile. There is no jurisdiction for this court to retain those claims and they are dismissed.

At the end of the May 20, 2008 oral argument, defendants contended that even if I were to dismiss the ERISA claims, this Court would still have jurisdiction over the case by virtue of the state law claims being preempted by ERISA. Because this issue was not raised or briefed, I allowed the parties to file supplemental memoranda on the issue. Having considered those memoranda, and having heard further oral argument, I reject defendants' position.

The thrust of defendant's argument is that the common law claims are based on conduct that is exclusively regulated by ERISA because the claims are essentially directed at the role of the plan fiduciary. As such, defendants contend, Miller does not apply and the claims are preempted. Accordingly, defendants continue, this Court has jurisdiction.

For the purposes of this motion, defendants accept the allegations in support of the common law claims as true, and describe those allegations as ones that the decedent "was misled by the plan administrator, who is a plan fiduciary." Defts' Supp'l Mem. at p. 3. Defendants note that plaintiff alleges that

defendants' statements about the life insurance "were contrary to the terms of the Plan," and that she alleges that as a result of the plan administrator misleading the decedent about the terms of the plan, the decedent did not apply for or receive benefits. Thus, defendants argue, "the alleged conduct upon which plaintiff bases her common law claims [] falls squarely within ERISA"s regulation of the duties of plan fiduciaries." Id.; see also Id. at p. 6 ("the remarks alleged in the Amended Complaint in this case . . . are specific advice to an employee (or former employee), some of which specifically addresses an ERISA benefit and some of which, plaintiff claims, mislead the employee (or former employee) about an ERISA benefit. These alleged statements are unmistakably governed by ERISA's fiduciary prescriptions.").

Defendants correctly posit that ERISA preempts not only state laws relating to benefits under ERISA plans, but also state laws purporting to regulate the conduct of ERISA fiduciaries. E.g., Farr v. US West Commc'ns, Inc., 151 F.3d 908, 913 (9th Cir. 1998) (state law claims of fraud and negligent misrepresentation brought by plaintiffs who alleged that the defendant provided misleading tax consequence information about an early retirement option, were preempted), amended, 179 F.3d 1252 (9th Cir. 1999). Moreover, plaintiff does not contest defendants' assertion that ERISA may preempt claims whether or not ERISA provides a remedy. E.g., Olson v. General Dynamics Corp., 960 F.2d 1418, 1422-23 (9th Cir. 1991) (rejecting the plaintiff's argument that there was no preemption because ERISA did not provide a remedy and noting "[t]here is simply no reason to assume that Congress intended ERISA's preemptive reach to be coextensive with the Act's civil remedial

scheme.").

Next, defendants argue that Miller does not apply to the preemption of claims based on allegations of fiduciary misconduct. I disagree.

Miller was a preemption case. The claims in Miller were similar to the claims at issue here and there is little to distinguish Miller from this case. As described by the Ninth Circuit, the plaintiffs asserted the following factual allegations in support of their claims:

> Appellants allege, . . ., that Rite Aid offered, as part of the employment agreement with Miller, that Miller would be provided with life insurance. Appellants also allege that after Miller became terminally ill Rite Aid representatives assured her that she would continue to have life insurance through the time of her death. Miller allegedly repeated these assurances to her daughter. Appellants also allege that after Miller's death Rite Aid representatives told her daughter that Miller had life insurance at the time of her death.

Miller, 504 F.3d at 1104-05 (brackets omitted).

With the preemption issue squarely before it and the facts suggesting a breach of fiduciary duty-type claim, the Miller court nonetheless held that the very first question it must decide was whether the decedent was a participant or beneficiary under ERISA. The court noted that state common law claims are preempted by ERISA "'insofar as they may now or hereafter relate to any employee benefit plan' regulated by ERISA." Id. at 1105 (quoting 29 U.S.C. § 1144(a)). The court then explained, however, that "before a court wades into this provision's veritable Sargasso Sea of obfuscation, it must first resolve the simpler question of whether a party may assert a claim under ERISA." Id. (internal quotation omitted). The court continued, quoting from Harris:

> "it would be contradictory to rule that state law claims are preempted where the court has already held that the same plaintiffs may not assert a claim under ERISA because they are not 'participants' in the ERISA plan. . . . Unlike the Chesire [sic] Cat, one cannot have the smile of preemption without the stripes of participation."

Id. at 1106 (quoting Harris, 26 F.3d at 934) (ellipsis and "[sic]" in Miller).

I agree with plaintiffs that the question of participant status must precede the analysis of whether a claim falls within ERISA and is thus preempted. Miller teaches that if the plaintiff has no standing as a participant or beneficiary to bring an action under ERISA in the first place, there can be no preemption. As the court made clear, "ERISA does not preempt the claims of parties who do not have the right to sue under ERISA because they are neither participants in nor beneficiaries of an ERISA plan." Id.

Defendants argue that the Ninth Circuit, in footnote four in the Miller decision, recognized that a plaintiff alleging that he or she lost participant status because of fiduciary misconduct is not barred from seeking a remedy for that misconduct by the fact that he is not a participant at the time he files the lawsuit. Rather, a plaintiff may bring such a claim if he was a participant at the time of the alleged ERISA violation. Accordingly, defendants contend that here, because some of the alleged misconduct took place while Widdows was still alive and covered by the plan, and thus while he was still a participant, his common law claims are preempted.

The Miller court, after noting that the issue before it was one requiring the determination of participant or beneficiary status for claims of a decedent's estate and beneficiaries,

initially stated the court had "repeatedly held that whether a living party is a 'participant' or 'beneficiary' is determined as of the time the lawsuit is filed." Id. at 1106. The court then noted that it had never identified the applicable time for evaluating the claims of a decedent's estate and beneficiaries. Id. At the end of that sentence, the court inserted the following footnote:

> ERISA does not specify the relevant time, but we have deviated from our time-of-suit rule only once, when the employer's termination of the employee threatened to undermine the enforcement of ERISA's whistleblower provision, 29 U.S.C. § 1140, by an employee who was allegedly fired for challenging the decision to terminate the plan. McBride v. PLM Int'l, Inc., 179 F.3d 737, 742-43 (9th Cir. 1999). In this case, we do not need to create an exception to the standard rule because Rite Aid did not unlawfully single Miller out in a way that undermined her ability to bring an ERISA claim, or take any other action designed to undermine the enforcement of ERISA.

Id. at n.4.

Defendants contend that the court recognized an exception to Miller's "time-of-death" participant determination for a decedent's estate or beneficiaries in cases with breach of fiduciary duty claims based on the defendant's actions depriving the plaintiff of participant or beneficiary status.

I do not read the footnote this broadly. First, the court, in the footnote, noted an exception to the court's "time-of-suit" rule used for living plaintiffs, not its "time-of-death" rule it established for a decedent's estate or beneficiaries.

Second, the court cited McBride, which concerned an ERISA whistleblower claim under section 1140, not a breach of fiduciary duty claim. The issue in McBride was raised by the plaintiff's allegations that he was discharged because he criticized the

employer's proposed termination of an employee stock option plan. At the time he filed suit, he was not a current plan participant or beneficiary because he was no longer an employee. And, the employer had in fact terminated the stock option plan so there was no reasonable expectation of obtaining plan benefits in the future. Accordingly, without an exception to the "time-of-suit" rule, the plaintiff would never have been able to bring an ERISA claim.

The court explained that

> [r]equiring that claimants like McBride be plan participants at the time of suit would create a race to the courthouse. Standing would depend upon which event occurred first: the plan's termination, or the claimant's filing of a lawsuit. In this case, McBride alleged that his discharge was caused by his criticism of PLM's proposed ESOP termination. Ironic it would be indeed to hold that the plan's termination itself then deprived McBride of standing to sue.
>
> When an individual alleges, as here, that he was discharged in violation of ERISA's whistleblower provisions, his employer cannot be allowed to evade section 1140 accountability simply by terminating the plan and distributing the benefits. . . . If an employee is a participant at the time of the alleged ERISA violation and alleges that he was discharged or discriminated against because of protected whistleblowing activities, we hold that such an employee has standing to sue under ERISA. . . .
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> * * *
>
> We hold that under section 1140, participant status must be adjudged at the time of the alleged ERISA violation. Standing under section 1140 does not depend upon whether the former employee seeks to or could obtain reinstatement to covered employment.

<u>Id.</u> at 743-44.

<u>McBride</u> clearly limited its "time-of-suit" exception to claims under section 1140. Nothing in <u>Miller</u> expands that exception to common law breach of fiduciary duty claims.

Defendants cite a Third Circuit case which cited <u>McBride</u> as

support for its conclusion that a "but for" exception to ERISA standing applied to a breach of fiduciary duty case. Leuthner v. Blue Cross & Blue Shield of Ne. Pa., 454 F.3d 120, 128-29 (3d Cir. 2006) (explaining that in its view, a court may find ERISA statutory standing if the plaintiff can plead in good faith that he or she was an ERISA plan participant or beneficiary and that he or she still would be but for the alleged malfeasance of the plan fiduciary). I decline to follow this case because it is not controlling and it goes beyond the exception created in McBride which is limited to section 1140 whistleblower claims.

Third, without direction from the Ninth Circuit, I agree with plaintiff that McBride, and thus the citation to it in the Miller footnote, does not stand for the general proposition that the "time-of-suit" rule applies in all circumstances where there is an event that occurs subsequent to the alleged ERISA violation which affects the participant or beneficiary status. Rather, McBride addressed claims arising from events entirely within the control of the employer. The court made clear that actions solely within the employer's control would not defeat an employee from obtaining status as a participant for a whistleblower claim.

In the end, I agree with plaintiffs that all the claims in this case start and end with Miller and are resolved by the determination that the decedent's estate and beneficiaries are not ERISA plan participants or beneficiaries. As a result, the ERISA claims are dismissed and there is no federal court jurisdiction over the common law claims by virtue of them being preempted by ERISA.

Under 28 U.S.C. § 1447(c), "[i]f at any time before final

judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). Accordingly, I remand the state common law claims back to state court.

CONCLUSION

Defendants' motion to dismiss (#21) is granted. The ERISA claims are dismissed and the state court claims are remanded.

IT IS SO ORDERED.

Dated this 22nd day of August, 2008.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge